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No. 513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, *Petitioner*,

v.

CANNELTON SEWER PIPE COMPANY, *Respondent*.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF THE NATIONAL COAL ASSOCIATION

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MOTION OF THE NATIONAL COAL ASSOCIATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Pursuant to Rule 42 of the Rules of the Supreme Court of the United States, the National Coal Association respectfully moves for leave to file the accompanying brief on the merits as *amicus curiae* in this case.[1] The consents of the petitioner and of the respondent have been requested, but have not been granted.

The National Coal Association is a trade association whose members mine and market more than two-thirds

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[1] Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit in this case was granted December 14, 1959.

of the commercially produced bituminous coal in the United States.

This case involves the question of whether the Cannelton Sewer Pipe Company's deductions for depletion, under the Internal Revenue Code of 1939, are to be computed on the basis of fire clay and shale (mined by the Cannelton Sewer Pipe Company) or sewer pipe and other finished products (manufactured by the Cannelton Sewer Pipe Company from fire clay and shale mined by it). The case involves the interpretation of sections 23(m) and 114(b)(4) of the Internal Revenue Code of 1939.

The members of the National Coal Association compute their deductions for depletion under the same sections and subsections of the Internal-Revenue Code of 1939 as are applicable to fire clay and shale, namely, sections 23(m) and 114(b)(4).

The statute specifically provides that "ordinary treatment processes" for depletion purposes in the case of coal shall include the following:

> ". . . cleaning, breaking, sizing, and loading for shipment. . . ."[2]

The National Coal Association has no doubt that all of these processes are allowable as a part of "mining" in the case of coal, for depletion purposes, whether or not a market for the coal exists without applying such processes.

The movant wants to be certain that this Court does not inadvertently cast any doubt upon the foregoing stated position. It has some justification for fearing that such doubt may be cast by the opinion of this Court because of the unnecessarily broad and sweeping statements of the United States in its petition for certiorari and reply brief to the effect that "the gross income from mining."

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[2] Internal Revenue Code of 1939, section 114(b)(4)(B)(i).

for depletion purposes, ends at the point where the most basic product is arrived at.

The movant is not a participant in the controversy between the United States and the Cannelton Sewer Pipe Company as to the correct computation of depletion allowances for fire clay and shale. Although the same sections and subsections of the Internal Revenue Code of 1939 are involved in computing depletion allowances both for fire clay and shale and for coal, specific statutory provisions apply to coal which are not applicable to fire clay and shale.

If this Court should decide to uphold the contention of the United States that "Congress, at the least, meant to confine the allowance [for depletion] to the basic product sold by the particular mining industry,"[3] then it is of vital importance to the movant that this Court avoid casting any doubt on the allowability as "mining" of at least all of those processes applicable to coal which are specifically listed by Congress in section 114(b)(4) of the Internal Revenue Code of 1939.

Respectfully submitted,

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[3] Petition for Writ of Certiorari in *United States v. Cannelton Sewer Pipe Company*, October Term 1959, No. 513, p. 15

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UNITED STATES OF AMERICA, *Petitioner*,

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BRIEF AMICUS CURIAE OF THE NATIONAL COAL ASSOCIATION

INTEREST OF AMICUS CURIAE

The interest of the *amicus curiae* in this case is set forth in the motion to which this brief is attached.

ARGUMENT

I. The Amount of "The Gross Income From the Property" in the Case of Coal Has Been Specified by Congress Since 1943 (Effective Retroactively to 1932).

The broad authorization for deducting an allowance for depletion is contained in section 23(m) of the Internal Revenue Code of 1939, which provides in pertinent part as follows:

"In computing net income there shall be allowed as deductions .... In the case of mines . . . a reasonable

> allowance for depletion . . . according to the peculiar conditions in each case."

Substantially the same provision is to be found in section 611(a) of the Internal Revenue Code of 1954. Some provision for depletion of mines has been contained in every revenue law since the Revenue Act of 1913.

The statutory provision for an allowance for depletion in the case of coal is (Internal Revenue Code of 1939, section 114(b)(4)(A)):

> "The allowance for depletion under section 23(m) in the case of the following mines . . . shall be
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> * * * * * * *
>
> "(ii) in the case of coal, . . . 10 per centum.
>
> * * * * * * *
>
> of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property . . ."

This provision was reenacted in substance as section 613(a) and (b) of the Internal Revenue Code of 1954. Similar provisions as to coal have have been contained in all revenue laws since the Revenue Act of 1932, except that in 1951 the allowable percentage of gross income was raised from 5 to 10. The 50%-of-net-income limitation has remained constant.

For purposes for computing percentage depletion, the term "gross income from the property" means "the gross income from mining" (Internal Revenue Code of 1939, section 114(b)(4)(B); reenacted in Internal Revenue Code of 1954, as section 613(c)(1)).[4] The term "mining"

[4] "As used in this paragraph [i.e., paragraph (4) of section 114(b)] the term 'gross income from the property' means the gross income from mining. The term 'mining,' as used herein,

includes three categories of operations (Internal Revenue Code of 1939, section 114(b)(4)(B); reenacted in Internal Revenue Code of 1954, as section 613(c)(2)):

(1) "The extraction of the ores or minerals from the ground";

(2) "The ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products"; and

(3) In general, "so much of the transportation of ores or minerals (whether or not by common carrier) from the point of extraction from the ground to the plants or mills in which the ordinary treatment processes are applied thereto as is not in excess of 50 miles."

The term "ordinary treatment processes," which is an integral part of the definition of the term "mining," is defined to include certain specifically stated processes for certain specific minerals and for broad categories of minerals, and also some generally stated processes for specific minerals and for broad categories of minerals. Some processes are expressly excluded.

The term "the commercially marketable mineral product or products" is not defined in the statute. Neither is the descriptive phrase "normally applied by mine owners or operators

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shall be considered to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products. . . . The term 'ordinary treatment processes,' as used herein, shall include the following: (i) In the case of coal—cleaning, breaking, sizing, and loading for shipment; . . ." This provision was added, as section 114(b)(4)(B) of the Internal Revenue Code of 1939, by section 124(c) of the Revenue Act of 1943, and made retroactively effective to 1932 (58 Stat. 45). With an amendment in 1954 (which will be discussed in detail hereafter), it has remained in the Internal Revenue Code continuously since 1943, and now is contained in section 613(c)(1), (2), and (4)(A) of the Internal Revenue Code of 1954.

operators" defined in the Code. Thus, there is lacking in the statute any all-inclusive definition of the important words "the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products."

The basic contention of *amicus curiae* is that, regardless of what this Court may determine to be the meaning of the last-quoted phrase (or any of its parts) with respect to fire clay and shale, this phrase cannot in any event operate as a limitation on the "ordinary treatment processes" listed for coal in the very next sentence of section 114(b)(4)(B). This sentence provides in pertinent part:

> "The term 'ordinary treatment processes,' as used herein, shall include the following: (i) In the case of coal—cleaning, breaking, sizing, and loading for shipment."

II. The Processes Listed by Congress in Section 114(b)(4)(B)(i) of the Internal Revenue Code of 1939 Are All Clearly Allowable in Determining "The Gross Income From Mining" in the Case of Coal, Without Regard to Whether Any or All of Such Processes Are, in Fact, Necessary "in Order to Obtain the Commercially Marketable Mineral Product or Products."

The United States, in its petition for certiorari in this case, has (perhaps unintentionally) used extremely broad language which, if accepted by this Court, would tend to cast doubt on the above interpretation of the statute as it relates to coal.

Such interpretation is, we submit, unquestionably correct. Apparently denying that the problem of what is included in the phrase "ordinary treatment processes" is involved in the present case, and urging that the only problem involved is how to determine the identity of the "commercially marketable mineral product," the United States contends that the latter term refers to the basic

product sold by the particular mining industry—that is, the first (cheapest and most primitive) commercially marketable product made by the branch of the mining industry concerned.[5]

Whatever the merits of this argument as applied to fire clay and shale (and we express no opinion as to this question), it is clearly erroneous as applied to coal and to other mineral products as to which Congress has seen fit to list certain processes which are allowable as "ordinary treatment processes" in determining "the gross income from mining."

The plain language of the statute compels this conclusion. Congress has used the words "shall include," rather than "may include" or some other similarly permissive language, to introduce its listing of processes which are, in the case of coal, "ordinary treatment processes." At least all of the listed processes are to be considered "mining" in the case of coal. It is thus entirely clear that "cleaning, breaking, sizing, and loading for shipment" are to be considered a part of "mining," for depletion purposes, in all instances where a taxpayer owning a mineral "property" applies such processes (or any of them) to coal extracted therefrom.[6]

The plain meaning of the language used in the statute is reinforced by the legislative history of the provision

[5] Petition for Writ of Certiorari in *United States* v. *Cannelton Sewer Pipe Company*, October Term 1959, No. 513, pp. 11-5; Reply Brief for the United States, ibid., p. 2.

[6] In addition, the owner of a coal "property" may, in some instances, be entitled to percentage depletion (computed as indicated in the preceding sentence) even if the specified "ordinary treatment processes" and other parts of the "mining" operation are not performed by him, due to the provision in section 23(m) of the Internal Revenue Code of 1939 that "In the case of leases the deductions shall be equitably apportioned between the lessor and lessee."

defining "the gross income from mining" in the case of coal. The definition of "mining" was added to section 114(b)(4) of the Internal Revenue Code of 1939 by section 124(c) of the Revenue Act of 1943 (58 Stat. 45). This provision was added by the Senate Committee on Finance, not having been included in the House bill. The following explanations in both the "Summary of Principal Changes" and the "Detailed Discussion of the Technical Provisions of the Bill" in this Committee's report spell out the intention of Congress with complete clarity (S. Report No. 627, pp. 23-4, 55 (1943); 1944 I.R.B. pp. 991-2, 1013; italics added):

> "Section 114(b)(4) of the Code is amended to include a definition of 'gross income from the property' for purposes of percentage depletion of mines. . . . The purpose of the provision is to make certain that the ordinary treatment processes which a mine operator would normally apply to obtain a marketable product should be considered as a part of the mining operation, and to give reasonable specification of what are to be considered such processes for various kinds or classes of mines.
>
> "The law has never contained such a definition, and its absence has given rise to numerous disputes. *The definition here prescribed expresses the congressional intent of these provisions as first included in the law, and is in accord with the original regulations and the Bureau practices and procedures thereunder. It is therefore made retroactive to the date of such original provisions.*
>
> * * * * * *
>
> "Subsection (c), which was not in the House bill, adds a new subparagraph (B) to section 114(b)(4) of the Code to define for the purposes of section 114(b)(4) the term 'gross income from the property.' For such purposes the term 'gross income from the property' means the gross income from mining. The term 'mining' shall be considered to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to

obtain the commercially marketable mineral product or products. It is further provided that *the term 'ordinary treatment processes,' as so used, shall include the following:*

"(1) *In the case of coal—cleaning, breaking, sizing, and loading for shipment; . . .*"

Further indications of the intention of Congress are to be found in other actions taken with respect to the depletion allowance for coal for the taxable year 1951 (the year involved in this case, and the year in which fire clay and shale, the minerals involved in this case, were added to the list of minerals entitled to percentage depletion).

In the first place, the percentage depletion rate for coal was increased from 5% to 10% of "the gross income from mining," by section 319 of the Revenue Act of 1951 (this was the same section which added fire clay and shale to the list of minerals entitled to percentage depletion). The increase in the depletion rate for coal was made applicable to all taxable years beginning after December 31, 1950.[7]

In the second place, Congress provided that the income from coal royalties should be considered as gain or loss upon the sale of coal (subject to capital gains treatment), and at the same time specified that an owner of coal qualifying for such capital gains treatment "shall not be entitled to the allowance for percentage depletion provided for in section 114(b)(4) with respect to such coal." This provision, section 117(k)(2) of the Internal Revenue Code of 1939, was made applicable to taxable years ending after December 31, 1950, but only with respect to amounts received or accrued after such date.

[7] P.L. 594, 82d Cong., 2d Sess., section 5, amended section 319(e) of the Revenue Act of 1951 to provide that the amendments made by section 319 should be effective on and after January 1, 1951 (66 Stat. 820).

[8] Added by Revenue Act of 1951, section 325 (65 Stat. 501).

The enactment of these two provisions in the Revenue Act of 1951 shows that Congress carefully considered the matter of depletion allowances for coal, and determined to make one liberalizing amendment and one restrictive amendment with respect thereto. No action whatsoever was taken with respect to the definition of "mining," which had been in the Internal Revenue Code since 1943, and none was even remotely considered.[9]

III. The Conclusion That Considerations of Marketability Are Irrelevant in Determining "The Gross Income From Mining" in the Case of Coal Is Reinforced by Subsequent Legislation on the Same Subject.

In 1954 Congress amended the Internal Revenue Code's definition of "mining" by adding to the list of "ordinary treatment processes" in the case of coal the following: "dust allaying, treating to prevent freezing." The amended provision reads (Internal Revenue Code of 1954, section 613(c); new language indicated by italics):

> "(c) Definition of Gross Income From Property.—For purposes of this section—
>
> "(1) Gross Income From the Property.—The term 'gross income from the property' means, *in the case of a property other than an oil or gas well*, the gross income from mining.
>
> "(2) Mining.—The term 'mining' includes not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products, . . .
>
> * * * * * * *
>
> "(4) Ordinary Treatment Processes.—The term 'ordinary treatment processes' includes the following:

[9] See H. Report No. 586, pp. 29-32, 114, 117-8 (1951); S. Report No. 781, pp. 37-8, 42-3; *id.*, Part 2, pp. 37, 43-5 (1951).

"(A) In the case of coal—cleaning, breaking, sizing, *dust allaying, treating to prevent freezing*, and loading for shipment; . . ."

Both the fact of the addition of "dust allaying, treating to prevent freezing" to the "ordinary treatment processes" for coal, and the legislative history leading up to such addition, show beyond peradventure that Congress has always intended (since the original enactment of the provision in 1943) that all of the listed processes shall be considered as "mining" without any regard to marketability. The amendment contained in the Internal Revenue Code of 1954 presents an instance where subsequently enacted legislation may be "considered to throw a cross light" on what has gone before (to borrow the words of Judge Learned Hand in *United States v. Aluminum Company of America*, 148 F. 2d 416, 429 (C.A. 2 (1945)).

On February 25, 1954 (prior to the amendment), the Tax Court had ruled that dust allaying of coal was not an "ordinary treatment process" and hence not a part of "mining" for depletion purposes (*The Black Mountain Corporation v. Commissioner of Internal Revenue*, 21 T.C. 746). The reason for the court's conclusion was that "the first commercially marketable mineral product was the coal itself," or, in other words, that dust allaying was not "necessary to create a commercially marketable mineral product out of the coal in question."[10] The court found that over 90% of all coal sold was sold without dust allaying. This fact was specifically pointed out to the Senate Committee on Finance when it was considering the 1954 amendment.[11]

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[10] 21 T.C. at 757. Although reaching a result adverse to the taxpayer with respect to dust allaying, the Tax Court clearly indicated its belief that Congress, by its use of the word "include" (in section 114(b)(4)(B) of the Internal Revenue Code of 1939), "intended to encompass also other processes used to produce commercially marketable coal" (21 T.C. at 756, and f.n. 3).

[11] Hearings before the Committee on Finance, United States Senate, on H.R. 8300, Part 3, pp. 1409-18 (1954).

Thus, the exact purpose of Congress in listing "dust allaying" (in section 613(c)(4)(A), Internal Revenue Code of 1954) as being included within the term "ordinary treatment processes" was to reverse the effect of the Tax Court's decision in the *Black Mountain* case. A construction of the statute which made the allowability of dust allaying as a part of coal "mining" dependent upon the lack of a market for coal without such treatment process would be completely unsupportable, since it would amount to a finding that Congres accomplished nothing by adding dust allaying to the list of "ordinary treatment processes." No sensible reading of the provisions in the Internal Revenue Code of 1939 prior to this amendment could, we submit, make the allowance of any of the processes then listed by Congress dependent in any way upon the lack of a market for coal without the application of such process or processes.

IV. Subsequent Official Statements by the Treasury Department Further Emphasize the Correctness of the Proposition That, in the Case of Coal, "Mining" Shall Include All of the Processes Listed in Section 114(b)(4)(B)(i) of the Internal Revenue Code of 1939, Without Regard to Marketability.

The Treasury Department itself has long allowed all of the listed processes in the case of coal to be considered as "mining" for depletion purposes, regardless of whether the coal was marketable without the application of such processes. In fact, Treasury Regulations had expressly provided for the allowance of the listed processes since 1932 (long before their codification in 1943), as was recognized by Treasury officials testifying before the House Committee on Ways and Means in March, 1959.[12] This testimony, presented in connection with a Treasury draft bill to amend the definition of "the gross income from

[12] Regulations 77, Relating to the Income Tax, under the Revenue Act of 1932, Article 221(g)(1), p. 61 (1933).

mining", clearly shows that the Department at that recent date recognized all the listed processes as "mining" in the case of coal, without regard to any theory of marketability, and was not then asking Congress to make any change in this respect.

The following excerpt from the material submitted to the House Committee on Ways and Means by the Treasury Department at the request of Congressman Ikard clearly spells out the long-standing administrative interpretation of "mining," for depletion purposes, in the case of coal (Hearings before the Committee on Ways and Means, House of Representatives, "Mineral Treatment Processes for Percentage Depletion Purposes," pp. 30-2 (1959); italics added):

"LEGISLATIVE HISTORY AS TO CUTOFF POINT

* * * * * *

"Treasury regulations were promulgated to define gross income from the property as used with respect to *coal*, metal mines, and sulfur. Regulations 77 promulgated under the Revenue Act of 1932 article 221(g), closely parallels the present day statutory provisions and regulations. These regulations said plainly that 'gross income from the property' meant the selling price of the crude mineral product or, if the crude product were not sold as such but was processed, the field price before the application of any processes to which the crude mineral product may have been subjected (*with the exception of certain specified processes discussed below*) and before transportation from the place where the last of the specified processes was supplied. *The processes enumerated, which were allowed to be applied to increase the value of the capital which was allowed tax-free recoupment, were clearly of the type which were regarded as processes which resulted in a product of a mine* (i.e., mineral concentrates) as distinguished from a manufactured or refined product. *Thus, coal could be cleaned, broken, sized and loaded at the mine for shipment;* sulfur could be pumped, cooled, broken and loaded at the mine

for shipment; and ores customarily sold in the form of a crude mineral product could be sorted, concentrated and loaded at the mine for shipment. Processes which resulted in a refined product, as compared to those which still left the mineral in a crude state, were not allowed in arriving at a value of the capital which was to be allowed tax-free recoupment.

"In the Revenue Act of 1943, Congress incorporated for the first time into the Internal Revenue Code *the ordinary treatment processes which were to be included in the concept of mining and the income from which would be within the definition of gross income from the property* (sec. 124(c), Rev. Act of 1943).[4] In explaining this amendment, which originated as a Senate amendment, the Senate Finance Committee stated (S. Rept. No. 627, 78th Cong., 1st sess., pp. 23-24; 1944 cum. bull. 973, 992):

> "'The purpose of the provision is to make certain that the ordinary-treatment processes which a mine operator would normally apply to obtain a marketable product should be considered as a part of the mining operation, and to give reasonable specification of what are to be considered such processes for various kinds or classes of mines.
>
> "'The law has never contained such a definition, and its absence has given rise to numerous disputes. The definition here prescribed expresses the congressional intent of these provisions as first included in the law, and *is in accord with the original regulations and the Bureau practices and procedures thereunder.* It is, therefore, made retroactive to the date of such original provisions.' [Emphasis supplied.]"

Testimony of Treasury Department officials in the March, 1959, hearings was to the effect that the Department's draft bill represented existing official administrative interpretations of the law relating to "the gross income from mining" for purposes of computing percentage depletion. Under the proposed bill, it was clear that all of the processes listed for coal in the existing statute would continue to be allowed without regard to any "marketability"

test. David A. Lindsay, Assistant to the Secretary of the Treasury, stated (*id.*, p. 3):

> ". . . the Treasury Department has long interpreted the statute to mean that the gross income to be used in the computation of the depletion deduction is the gross income attributable to treatment processes equivalent to those specifically named in the statute."

Similarly, Jay W. Glasmann, Assistant General Counsel, said (*id.*, p. 7; italics added):

> "The draft bill on mining is intended to restore the rules for computing gross income from mining which were applied prior to the recent court decisions. *No attempt has been made to roll back those processes which are treated as mining under express provisions of the statute or by administrative practice.*
>
> * * * * * *
>
> "*Certain processes in the case of coal*, sulfur recovered by the Frasch process, quicksilver ores, talc, magnesite, and phosphate rock *which are treated as mining in the present statute* are also treated as mining in the draft bill."

The following colloquy between Congressman Harrison and Mr. Lindsay shows beyond any reasonable doubt that the Treasury Department was not seeking, in March, 1959, to amend the statute in any way which would affect the existing, recognized, and long-standing methods of computing depletion allowances for coal (*id.*, p. 23):

> "Mr. Harrison. Mr. Lindsay, is the Treasury draft intended to affect the present methods of computing depletion allowances on coal?
>
> "Mr. Lindsay. No; I don't believe it is.
>
> "Mr. Harrison. The answer, I assume, then is 'No'?
>
> "Mr. Lindsay. No.
>
> "Mr. Harrison. Is it intended to eliminate depletion based on presently allowable mining processes performed by mine owners on their own coal which, however, is extracted by independent contractors?

"Mr. Lindsay. It does not get into the question at all."

CONCLUSION

Much of the coal mined in the United States is sold without the application of some or all of the "ordinary treatment processes" listed as being included in "mining," for depletion purposes, in section 114(b)(4)(B)(i) of the Internal Revenue Code of 1939. The question of marketability, however defined, has never been considered by either the industry or the Treasury Department as having any relevance in determining what constitute the allowable treatment processes in computing "the gross income from mining" in the case of coal. Any statement, or even implication, to the contrary in the opinion of this Court in the present case might seriously and adversely affect the interests of the members of the National Coal Association.

The purpose of this brief is simply to urge this Court to avoid such a statement or implication in its opinion relating to the proper methods of computing percentage depletion in the case of fire clay and shale (a controversy which we have no intention of entering into). *Amicus curiae* does not in any way seek an advisory opinion that the present methods of computing coal depletion allowances are correct, but does earnestly request this Court to make clear that the adoption of any contentions of the United States relating to marketability which this Court may decide to accept affects solely the definition of "mining" with respect to the minerals involved in this case.

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